**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Modification of FM or
Television Licenses
Pursuant to Section 316
of the Communications Act.

**ORDER**

**Adopted: May 1, 1987; Released: June 5, 1987**

By the Commission:

1. The Commission is hereby revising its rules and procedures in order to implement recent amendments to Section 316 of the Communications Act of 1934, as amended.[1] These amendments concern the Commission's current procedures in modifying the licenses or permits of existing stations to different channels by rule making to amend the FM or TV Table of Allotments.[2] Under our former procedure, we have afforded the affected station the opportunity to request a hearing on the proposed modification. In view of the recent legislation amending Section 316 of the Act, we shall no longer afford affected stations an automatic right to a hearing upon request.[3] The following discussion will review our current procedures, the underlying legislation, and explain our new procedures.

## CURRENT PROCEDURE

2. In most situations, a petition for rule making is filed requesting the deletion of an existing channel in the Table and its reallotment to a new community where there is no other such channel available. As part of the same rule making proceeding, a substitute channel of the same class is provided to the old community and the license modified accordingly. Under this procedure, in order to effectuate the requested substitution of an occupied channel and modification of the license, we will issue a *Notice of Proposed Rule Making and Order to Show Cause*. The *Notice* proposes the channel substitution while the *Order* is directed to the licensee of the existing channel to afford it the right to a hearing upon request, the right to file an objection or to waive a hearing by consenting to the proposed modification. In most situations the right to a hearing is waived and no written objection is filed. In such cases, we would issue a *Report and Order* allotting the new channel and modifying the existing license or permit to specify the new channel.

3. In the past, where the licensee does request a hearing, we have not, in practice, actually designated any hearings on a proposed modification pursuant to Section 316 of the Act. Instead, under *Transcontinent TV Corp. v. FCC*, 308 F 2d 339 (D.C. Cir. 1962), the modification was made effective at the expiration of the present 3-year license term. The licensee would then specify the new channel in its renewal application. However under subsequent legislative changes which created 7-year (FM) and 5-year (TV) license terms, the delay in a *Transcontinent* procedure is no longer an acceptable alternative in most cases.

## LEGISLATIVE AMENDMENT

4. By Public Law 98-214 enacted December 8, 1983, 97 Stat. 1467, the phrase "show cause by public hearing, if requested, why such order of modification should not issue" was deleted from Section 316 of the Act. Instead, Section 316 now only requires that we notify the affected station of the proposed action and the public interest reasons for that action and afford at least 30 days to protest. *See* fn. 1, *supra*. This legislation was sought by the Commission in response to *Western Broadcasting Co. v. FCC*, 674 F 2d 44 (D.C. Cir. 1982). In *Western Broadcasting*, *supra*, the appellant station claimed that another station's proposed transmitter relocation would cause objectionable interference to its coverage area and result in a modification of license. In reversing the Commission, the Court held that the allegations raised by the appellant were sufficient under the former Section 316 to require a hearing. Furthermore the Court found that there was no legal basis to impose the substantial and material question of fact standard of Section 309 of the Act for petitions to deny with respect to an objection under Section 316 of the Act. Subsequently, Public Law 98-214 did impose the Section 309 standard for protests under Section 316. Thus, we are no longer required under Section 316 to automatically hold a hearing upon request whenever a modification of license is alleged.

5. By that action, Congress addressed both the inefficiency of the former automatic hearing requirement and the potential for abuse and delay. Now, in order to have a hearing under Section 316, any resulting protest must now set forth a substantial and material question of fact as required by Section 309 of the Act. If the affected station is unable to meet this standard and we otherwise find, on the basis of written submissions, that the proposed modification would be in the public interest, there is no valid reason to have a hearing. Avoiding such an unnecessary hearing would expedite the overall processing of the rule making proceeding and conserve significant administrative resources. In the event the affected station does raise a substantial and material question of fact in its protest, the hearing process would be expedited by enabling us to specify issues prior to designation. Finally, the substantial and material question of fact requirement precludes frivolous requests for a hearing merely to delay a rule making proceeding.

## NEW PROCEDURE

6. There are now pending several rule making petitions involving the modification of existing FM or television licenses. In view of this fact and Public Law 98-214 revising Section 316 of the Act, we believe it is appropriate at this time to implement the new procedure. We also believe that retaining our former procedure is unnecessary and can lead to abuse and delay. Under the new procedure, we will continue to issue a *Notice of Proposed Rule Making and Order to Show Cause* in which the existing licensee or permitee will be informed of the reasons for the proposed modification and offered an opportunity to protest. The only change to the procedure

is that now in order to have a hearing under Section 316 of the Act, the protest must raise a substantial and material question of fact as required by Section 309 of the Act. In such event, we would designate the proposed modification of license or permit for hearing under Section 316. *C.f. Western Broadcasting Co. v. FCC, supra.* We may also find that the licensee has raised sufficient reasons why the public interest would not be served by the proposed modification in which case the proposal could be denied without the need for a hearing. On the other hand, if the affected licensee or permittee fails to present a substantial and material question of fact and we are able to make the requisite public interest finding, we shall issue a *Report and Order* granting the substitution and modifying the existing license. This procedure comports withs Section 316 and offers the most efficient means to effectuate the modifications in these situations.[4] The appendix sets forth an amendment to Section 1.87 of the Commission's Rules implementing the legislative change. We shall apply this new procedure to pending cases in which a *Notice of Proposed Rule Making and Order to Show Cause* has been issued. In order to advise affected stations that they will not have an automatic right to a hearing and afford at least 30 days to protest the proposed modification, a *Further Notice of Proposed Rule Making* may be necessary.

## ADDITIONAL MATTERS

7. We also believe it is appropriate in this proceeding to address some potential concerns of affected stations. These concerns existed under our former procedures and, in all probability, will continue to exist under the new procedure. Addressing these matters at this juncture may alleviate some of the concerns which might otherwise lead to unnecessary protests to proposed modifications. Foremost among these concerns is the cost of a change in channel. This cost not only includes the technical change of the station's frequency and the promotional expenses relating to the new channel, but also the potential for a temporary decrease in audience. Generally, these concerns have not outweighed the public interest benefits of the new channel. It is well settled that the ultimate permittee of the new channel to the Table is responsible for reimbursement of the reasonable costs (both technical and promotional) incurred by the affected station. *See Circleville, Ohio,* 8 FCC 159 (1967). In addition to reimbursement of promotional expenses, it should be emphasized that the affected station is afforded a significant lead time between the release of a *Report and Order* modifying its license or permit and the actual change in its channel.[5] This lead time, coupled with promotional efforts, will provide an additional safeguard with respect to any potential audience loss.

8. Additional concerns expressed by affected stations relate to the fact that the existing licensee may prefer to retain its existing channel so that it may relocate its transmitter to a site which can only be accommodated by the present channel[6] or upgrade on its co-channel or adjacent channel and avoid a comparative hearing. *See Modification of FM Licenses to Specify Adjacent or Co - Channels,* 51 Fed. Reg. 20290, published June 4, 1986. In both of these situations, the affected station could submit these proposals as timely counterproposals. In accordance with existing procedures and policies, these proposals would be evaluated in the context of the rule making in accordance with Section 307(b) of the Act and the Commission's comparative criteria set forth in *FM Assignment Policies and Procedures,* 90 FCC 2d 88 (1982).

9. The Administrative Procedure Act exempts rules of procedure and practice from its notice and comment rule making requirements. U.S.C. 553(b)(A). Because the new rule adopted herein is purely procedural in nature, and because we believe that no useful purpose would be achieved by public comments on these rules implementing legislative changes, we will not elicit comments on the matters discussed herein.

10. Pursuant to the Regulatory Flexibility Act of 1980, the Commission finds as follows:

**I. Reason for Action**

An evidentiary hearing for an existing broadcast station in regard to a modification of its license can impose a burden on a licensee without any compensating public interest benefit. This action seeks to avoid the delay and expense of unnecessary public hearings.

**II. The Objective**

The Commission proposes to reduce this burden in many instances by streamlining the modification process to avoid unnecessary hearings.

**III. Legal Basis**

Section 303(r) of the Communications Act of 1934, as amended, which permits the Commission to make such rules and regulations, not inconsistent with law, as may be necessary to carry out the provisions of this Act. Section 316 which was amended to delete the requirement of a hearing before an involuntary modification can take place.

**IV. Description, Potential Impact and Number of Small Entities Affected**

Many broadcast stations can be classified as small businesses. These stations will benefit by lessening the burdens resulting from an unnecessary hearing.

**V. Recording, Record Keeping and Other Compliance Requirements**

None.

**VI. Federal Rules Which Overlap, Duplicate or Conflict With This Proceeding**

None.

**VII. Significant Alternatives Minimizing Impact on Small Entities**

The alternative would be to maintain the *status quo* and thus impose on a licensee the potential of a significant cost connected with a hearing. This would not accomplish the beneficial objective sought in this rule making.

11. Authority for adoption of the rules contained herein is contained in Sections 154, 303 and 316 of the Communications Act of 1934, as amended. For the reasons recited in paragraph 5, *supra,* the prior notice and effective date provisions of 5 U.S.C. 553 of the Administrative Procedure Act are inapplicable.

12. Accordingly, IT IS ORDERED, That Section 1.87 of the Commission's Rules IS AMENDED as set forth in the Appendix below, effective **July 20, 1987.**

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

**APPENDIX**

47 CFR Part 1 is amended as follows:

1. The authority citation for Part 1 continues to read as follows:

**Authority: 47 U.S.C. 154, 303.**

2. Section 1.87 is revised to read as follows:

**Section 1.87 Modification of License or Construction Permit on Motion of the Commission.**

(a) Whenever it appears that a station license or construction permit should be modified, the Commission shall notify the licensee or permittee in writing of the proposed action and reasons therefor and afford the licensee or permittee at least thirty days to protest such proposed order of modification, except that, where safety of life or property is involved, the Commission may by order provide a shorter period of time.

(b) The notification required in paragraph (a) of this section may be effectuated by a notice of proposed rule making in regard to a modification or addition of an FM or television channel to the Table of Allotments (Sections 73.202 and 73.504) or Table of Assignments (Section 73.606). The Commisison shall send a copy of any such notice of prposed rule making to the affected licensee or permittee by certified mail, return receipt requested.

(c) Any other licensee or permittee who believes that its license or permit would be modified by the proposed action may also protest the proposed action before its effective date.

(d) Any protest filed pursuant to this section shall be subject to the requirements of Section 309 of the Communications Act of 1934, as amended, for petitions to deny.

(e) In any case where a hearing is conducted pursuant to the provisions of this section, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commmission except that, with respect to any issue that pertains to the question of whether the proposed action would modify the license or permit or a person filing a protest pursuant to paragraph (c) of this section, such burdens shall be as described by the Commission.

(f) In order to utilize the right to a hearing and of the opportunity to appear and give evidence upon the issues specified in any hearing order, the licensee or permittee, in person or by his attorney, shall, within the period of time as may be specified in the hearing order, file with the Commission a written statement stating that he or she will appear at the hearing and present evidence on the matters specified in the hearing order.

(g) The right to file a protest or have a hearing shall, unless good cause is shown in a petition to be filed not later than 5 days before the lapse of time specified in paragraphs (a) or (f) or this section, be deemed waived:

(1) In case of failure to timely file the protest as required by paragraph (a) of this section or a written statement as required by paragraph (f) of this section.

(2) In case of filing a written statement provided for in paragraph (f) of this section but failing to appear at the hearing, either in person or by counsel.

(h) Where the right to file a protest or have a hearing is waived, the licensee or permittee will be deemed to have consented to the modification as proposed and a final decision may be issued by the Commission accordingly. Irrespective of any waiver as provided for in paragraph (g) of this section or failure by the licensee or permittee to raise a substantial and material question of fact concerning the proposed modification in his protest, the Commission may, on its own motion, designate the proposed modification for hearing in accordance with this section.

(i) Any order of modification issued pursuant to this section shall include a statement of the findings and the grounds and reasons therefor, shall specify the effective date of the modification, and shall be served on the licensee or permittee.

**FOOTNOTES**

[1] Section 316 of the Act reads as follows:

(a)(1) Any station license or construction permit may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this Act or of any treaty ratified by the United States will be more fully complied with. No such order of modification shall become final until the holder of the license or permit shall have been notified in writing of the proposed action and the grounds and reasons therefor, and shall be given reasonable opportunity, of at least thirty days, to protest such proposed order of modification; except that, where safety of life or property is involved, the Commission may by order provide, for a shorter period of notice.

(2) Any other licensee or permittee who believes its license or permit would be modified by the proposed action may also protest the proposed action before its effective date.

(3) A protest filed pursuant to this subsection shall be subject to the requirements of Section 309 for petitions to deny.

(b) In any case where a hearing is conducted pursuant to the provisions of this section, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission; except that, with respect to any issue that addresses the question of whether the proposed action would modify the license or permit of a person described in subsection (a)(2), such burdens shall be as determined by the Commission.

[2] In most situations, FM and television rule making petitions do not require changes in existing channels in the Tables. Situations within the ambit of this proceeding only arise in the context of an Order to Show Cause why a license or permit should not be amended to specify a different channel.

[3] In adopting this new policy, we will also be revising Section 1.87 of the Commission's Rules which tracks with the former Section 316 with respect to an automatic right to a hearing upon request by the affected licensee or permittee. The procedure has most often been used in connection with the modification of FM station licenses and TV channel offset changes. In the case of TV and AM station licenses, the Commission has rarely, if ever, had occasion to approve such changes.

[4] In considering this matter, we are aware that Congress has not revised Section 303(f) of the Act which still requires a "public hearing" in connection with changes in the frequencies of broadcast stations. Section 303(f) paralleled the former Section 316 with respect to a specific reference to "public hearing." *WBEN Inc. v. U. S.*, 396 F.2d 601, 620 (2nd Cir. 1968), *cert. denied* 393 U.S. 914 (1968). We do not view the deletion of "public hearing" from Section 316 as creating an inconsistency with Section 303(f). Rather, the use of the phrase "public hearing" only evinces an intention by Congress to afford the affected licensee the opportunity to be heard prior to the Commission action changing its frequency, and such opportunity may be provided in the course of a rule making proceeding. *WBEN*, *supra* at 619. The revised Section 316 continues to afford this opportunity to the affected station. In meeting the "public hearing" requirement, we would also note that procedural due process does not require oral argument and cross-examination in every instance. *See FCC v. WIR, The Goodwill Stations, Inc.*, 337 U.S. 265 (1949).

[5] Typically the Commission provides one year to effectuate the change. However, in reality, it is not necessary for the change to take place until the use of the old channel actually prevents a newly authorized station from inaugurating service. In most cases the change can be delayed for considerably more than a year.

[6] In this connection, we will not require an affected station to change its transmitter site to accommodate a channel substitution. *North Charleston, South Carolina*, 47 Fed. Reg. 10560, published March 11, 1982. *Asheville, North Carolina*, FCC 76-181, Mimeo 39455, released March 5, 1976.